

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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1. Please note that the behavior prohibited in this draft relating to union organizing is based on California law.
2. In enacting the national Labor Relations Act, Congress intended to preempt the states from regulating the use by labor and management in the private sector of peaceful means of putting economic pressure on each other. See *Lodge 76, IAM v. WERC*, 427 U.S. 132, 96 S. Ct. 2548 (1976). The second point contained in each of the first and third paragraphs of the motion are particularly problematic from that standpoint. Moreover, those points each appear to conflict with the narrower approach counseled by the first instruction in each of those paragraphs -- namely, to draft the amendment to limit its application to how the medical assistance (MA) payments themselves are used. This amendment follows the narrower instructions, but even under that approach, a court might hold that part or all of this amendment is preempted by the national Labor Relations Act.
3. The JCF motion states that the attorney general or a private party may obtain damages and civil penalties in enforcement actions, but it does not specify what those damages are in cases brought on behalf of the state or how they are to be calculated. Therefore, this amendment does not include any provision for damages in actions brought on behalf of the state. It does, however, require the violator to return to the state money expended in violation of the prohibition in s. 49.45 (6n) (b) and provides a forfeiture based on the total amount unlawfully expended on union-related activity. It also permits a private person who is harmed as a result of a violation to obtain damages and specifies what those damages are.
4. It is unclear whether a district attorney may enforce the prohibition contained in this amendment.
5. Wisconsin courts do not appear to have addressed the question of when an intervenor may be awarded attorney fees. Under a recent court of appeals case, an intervening plaintiff has the same status as any other plaintiff in the case. *Kohler Co. v. Sogen International Fund, Inc.*, 2000 WI App. 60, 233 Wis. 2d 592, 608 N.W.2d 746, ¶ 11. That case, however, does not address attorney fees. Therefore, this amendment uses language from the JCF motion to specify the circumstances under which a prevailing intervenor is entitled to attorney fees.

6. The fungibility of money may make it difficult to prove a violation if a nursing facility receives both MA funds and other revenue. The facility may argue that it spent only other revenue on its union-related activities.

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